

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PETER ROBERT FLUX

Appeal 2007-0748
Application 09/890,771
Technology Center 3600

Decided: July 18, 2007

Before STUART S. LEVY, LINDA E. HORNER, and ANTON W. FETTING,
Administrative Patent Judges.

HORNER, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 1-4 and 12. Claims 1-12 are pending. Claims 5-9 have been withdrawn as directed to a non-elected species. Claims 10 and 11 are objected to

as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form (Answer 4). We have jurisdiction under 35 U.S.C. § 6(b).

SUMMARY OF DECISION

We AFFIRM.

THE INVENTION

Appellant's claimed invention is to an anchoring arrangement suitable for anchoring the lower end of a temporary installation of a flexible elongate safety line disposed in a substantially vertical orientation on a tall structure, such as electricity pylons and radio or satellite communication masts (Specification 1:2-6). Claim 1, reproduced below, is representative of the subject matter on appeal [element numbers from the Specification and the Figures have been added in brackets for ease of reference].

1. A fall arrest bottom anchor assembly [10] for use with a substantially vertically-oriented elongate safety line [70], said bottom anchor assembly comprising a safety line gripper [20], a safety line tensioner [80], a bracket [50] that is adapted to be fixedly mounted, wherein the gripper [20] includes a manually adjustable clamp [21, 31, 25, 35, and 27] that can be clamped to the safety line at an adjustable position along its length, the tensioner [80] including a hollow shaft [40] connected to the gripper [20], the hollow shaft [40] being adapted to receive the safety line [70] with the safety line [70] extending upwardly therefrom, said hollow shaft [40] having an externally screw-threaded portion [41] including a load setter [81] threadingly adjustable thereon

and adapted to bear against the underside of said fixed bracket [50] for adjusting the safety line tension to a predetermined value.

THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

David	GB 846,096	Aug. 24, 1960
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The Appellant seeks our review of the rejection of claims 1-4 and 12 under 35 U.S.C. § 102(b) as anticipated by David.¹

ISSUE

The Examiner found that the tensioning device of David teaches all of the claimed elements and is capable of tensioning a fall arrest line at its bottom end (Answer 4). The Appellant contends that David's tensioning device functions at the upper end of a guide rope rather than as a fall arrest system at the bottom of an upwardly extending safety line (Appeal Br. 4). The Appellant contends that David's tensioning device would not be capable of use as a bottom anchor for a height safety system because the length, thickness, applied static tension loads, and

¹ The Examiner withdrew the following rejections: claim 3 under 35 U.S.C. § 112, second paragraph; claims 1-4 and 12 under 35 U.S.C. § 103(a) as unpatentable over U.S. Patent No. 5,293,785 to Lichtenberg in view of GB Patent No. 917,980 to Davies or GB Patent No. 846,096 to David; claim 1 under 35 U.S.C. § 103(a) as unpatentable over Lichtenberg '785 in view of published French application, Publication No. 2 619 224 to Pillas, and claims 10 and 11 under 35 U.S.C. § 103(a) as unpatentable over Lichtenberg '785 in view of David or Davies, as applied to claims 1 and 2, and further in view of U.S. Patent No. 4,854,185 to Lichtenberg (Answer 4).

profile of expected dynamic loads encountered in height safety systems differ significantly from the conditions encountered in the mine lift system of David (Reply Br. 3). The issue before us is whether the Appellant has shown that the Examiner erred in finding David's tensioning system capable of use as a fall arrest bottom anchor assembly.

FINDINGS OF FACT

We find that the following enumerated findings are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427, 7 USPQ2d 1152, 1156 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. David discloses a rope tensioning device to be used with vertically-oriented guide and rubbing ropes used in mine shafts (David 1:9-12, 15, and 28-30).
2. David further discloses that "when used for tensioning a wire rope used as a guide in a mine shaft, for example, the device of the present invention [may] be attached to the upper or lower end of the wire rope" (David 2:97-101).
3. David discloses that one end of the rope is secured in a rope clamping gland (10) by means of a pair of clamps (25) (David 2:66-69). Figure 1 of David shows the rope extending through the clamp such that the clamp appears to be manually adjustable so that it can be clamped to the rope at an adjustable position along its length. As such, David discloses the claimed safety line gripper.

4. David discloses a base plate (1) fixedly mounted to a platform, a crown member (18), and tubes (23) and (24), secured respectively to base plate (1) and crown member (18), such that the combination of base plate (1), tube (23), tube (24), and crown member (18) forms a bracket adapted to be fixedly mounted (David 2:15-18 and 56-60 and Figure 1).

5. David discloses a tensioner that includes an externally-threaded, hollow thrust screw (6) and a load setter (nut 11) threadingly adjustable on the screw (6) and adapted to bear against the underside of crown member (18) for adjusting the rope tension to a predetermined value (David 2:69-87 and Figure 1).

6. David shows that the rope extends upwardly, i.e. toward a base plate (1), from the hollow thrust screw (6) (David, Figure 1).

7. The guiding and rubbing ropes used in mine shafts, which are tensioned at a loading of one ton per hundred yards (David 1:20-21), are capable of arresting a person from falling.

8. David's tensioning device for use with guiding and rubbing ropes of mine shaft systems is capable of functioning as a fall arrest bottom anchor assembly for use with a safety line.

9. "Bracket" is defined as "a simple or composite often carved or sculpted overhanging member that projects from a wall, pier, or other structure and is usu. [usually] designed to support a vertical load or to strengthen an angle" Webster's Third International Dictionary (unabridged) 265, G. & C. Merriam Co. (1971).

PRINCIPLES OF LAW

“It is well settled that the recitation of a new intended use for an old product does not make a claim to that old product patentable.” *In re Schreiber*, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997) (citations omitted) (holding that claims to a dispensing top for popped popcorn were anticipated by a prior art oil can with the same structure). “[T]he question whether a reference is analogous art is irrelevant to whether that reference anticipates.” *Schreiber*, 128 F.3d at 1478, 44 USPQ2d at 1432 (citing *In re Self*, 671 F.2d 1344, 1350, 213 USPQ 1, 7 (CCPA 1982)).

A reference may be from an entirely different field of endeavor than that of the claimed invention or may be directed to an entirely different problem from the one addressed by the inventor, yet the reference will still anticipate if it explicitly or inherently discloses every limitation recited in the claims.

Id. at 1478, 44 USPQ2d at 1432. Similarly, reasonable expectation of success is a factor to be considered when determining whether a person of ordinary skill in the art would have been motivated to modify the prior art to achieve the claimed invention. *Brown & Williamson Tobacco Corp. v. Philip Morris, Inc.*, 229 F.3d 1120, 1124 (Fed. Cir. 2000). It is not relevant to the issue of anticipation, in which no modifications to the prior art are needed.

“[W]here the Patent Office has reason to believe that a functional limitation asserted to be critical for establishing novelty in the claimed subject matter may, in fact, be an inherent characteristic of the prior art, it possesses the authority to

require the applicant to prove that the subject matter shown to be in the prior art does not possess the characteristic relied on.” *Schreiber*, 128 F.3d at 1478, 44 USPQ2d at 1432 (citing *In re Swinehart*, 439 F.2d 210, 213, 169 USPQ 226, 228 (CCPA 1971)).

Further, “[i]f ... the body of the claim fully and intrinsically sets forth the complete invention, including all of its limitations, and the preamble offers no distinct definition of any of the claimed invention's limitations, but rather merely states, for example, the purpose or intended use of the invention, then the preamble is of no significance to claim construction because it cannot be said to constitute or explain a claim limitation.” *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305, 51 USPQ2d 1161, 1166 (Fed. Cir. 1999) (citations omitted).

We determine the scope of the claims in patent applications “not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction “in light of the specification as it would be interpreted by one of ordinary skill in the art.” *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364, 70 USPQ2d 1827, 1830 (Fed. Cir. 2004). We must be careful not to read a particular embodiment appearing in the written description into the claim if the claim language is broader than the embodiment. See *Superguide Corp. v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 875, 69 USPQ2d 1865, 1868 (Fed. Cir. 2004).

ANALYSIS

Claim Interpretation

We interpret the claim term “bracket” in accordance with its broadest reasonable interpretation in light of the Specification as it would be interpreted by one of ordinary skill in the art. The definition of bracket consistent with the Specification is an overhanging member that projects from a structure and is usually designed to support a vertical load (Finding of Fact 9). The Appellant’s Specification does not provide any narrower definition of bracket, and although it shows an L-shaped structure in an embodiment, we decline to import this depiction of a bracket into our interpretation of the claim term “bracket” because the common meaning of “bracket” is broader than the Appellant’s specific embodiment.

Anticipation

As found *supra*, the structural limitations recited in claim 1 are all found in the prior art tensioning device disclosed in David (Findings of Fact 2-6). The Appellant argued that “David et al. lacks the disclosure of any bracket that is adapted to be fixedly mounted and against whose underside the tensioner bears in order to provide tensioning of a vertically oriented safety line that extends upwardly from the fall arrest bottom anchor assembly and is adjustably gripped by it” (Appeal Br. 7). We find that the crown member (18) of David, as supported by the base plate (1), tube (23), and tube (24), satisfies the claimed “bracket” in accordance with the broadest reasonable interpretation of this claim term, because

these elements, when combined, form an overhanging member that projects from a structure and is designed to support a vertical load (Finding of Fact 4). As such, David's tensioner, *i.e.*, load setter (nut 11), bears against the underside of the bracket, *i.e.*, crown member (18), for adjusting the rope tension to a predetermined value (Finding of Fact 5). Further, the recitation of a new intended use of the known tensioning device of David as a bottom anchor assembly for a fall arrest system does not make the claim to the known tensioning device patentable. The Examiner therefore correctly found that David established a *prima facie* case of anticipation.

The Appellant argues that David does not disclose using its tensioning device as a fall arrest bottom anchor for a safety line (Appeal Br. 4). The Appellant's recitation in the preamble of the intended use of the claimed assembly for a bottom anchor assembly on a safety line is not entitled to patentable weight because the body of claim 1 fully and intrinsically sets forth the complete invention, including all of its limitations, and the preamble offers no distinct definition of any of the claimed invention's limitations, but rather merely states, for example, the purpose or intended use of the invention. Further, David discloses that the prior art tensioning device may be attached to the bottom of the guide rope (Finding of Fact 2). This guide rope clearly serves a safety function in the mine shaft and is thus a safety line. As such, David discloses a bottom anchor assembly for a safety line.

Once the Examiner establishes a *prima facie* case of anticipation, the burden then shifts to the Appellant to show that the prior art structure does not inherently

possess the functionally defined limitations of his claimed apparatus. *See Schreiber*, 128 F.3d at 1478, 44 USPQ2d at 1432. *See also In re Spada*, 911 F.2d 705, 708, 15 USPQ2d, 1655, 1658 (Fed. Cir. 1990); *In re King*, 801 F.2d 1324, 1327, 231 USPQ 136, 138-39 (Fed. Cir. 1986); *In re Best*, 562 F.2d 1252, 1254-55, 195 USPQ 430, 433 (CCPA 1976). We find that the Appellant failed to meet this burden.

The Appellant contends that the length of cables and the applied tensions in the field of lift shaft rubbing ropes and the necessary cable diameter are orders of magnitude greater than those encountered in safety lines for height safety systems (Reply Br. 3). The claims, however, recite only that the anchor assembly is for use with “a substantially vertically-oriented elongate safety line.” The claims do not limit the intended use to a single-person safety line, or otherwise define the context within which the safety line is used, such that it would impose structural constraints on the claim elements. The claimed “safety line” is broad enough to include, for example, a safety line used in a fall arrest system for a mine shaft conveyance or cart. The claims also fail to specify the length of cables, applied tensions, or cable diameter with which the claimed anchor assembly is used.

Further, even if the claims were interpreted to be limited to a safety line used for a person when scaling a tall structure, such as those described in the Appellant’s Specification, David’s tensioning structure, which is capable of supporting a mine shaft cart containing numerous persons, would inherently be capable of withstanding the load applied by a single person and thus would be

capable of operating as a fall arrest bottom anchor assembly for such a safety line (Findings of Fact 7-8).

The Appellant contends that, in operation, the types of loads applied to the cables are different. In particular, he argues that a height safety system cable and its end supports will be subject to sudden shock loads when a fall occurs and is arrested, while the rubbing ropes of David will be subject in use to gradually increasing and decreasing loads as the mine cages move off and back toward their intended vertical path (Reply Br. 3). While it is true that these loads are different, the Appellant failed to show that David's tensioning device would not be capable of withstanding a sudden shock load when a fall occurs and is arrested. We find that it would (Findings of Fact 7-8).

The Appellant argues that David does not anticipate the claimed invention because the skilled person would not have a reasonable expectation of success that would have led the person to employ David's tensioning device as a bottom anchor (Reply Br. 3). Reasonable expectation of success is a factor to be considered when determining whether a person of ordinary skill in the art would have been motivated to modify the prior art to achieve the claimed invention. *Brown & Williamson Tobacco Corp. v. Philip Morris, Inc.*, 229 F.3d 1120, 1124 (Fed. Cir. 2000). Such an argument is applicable to rejections based on obviousness. It is not pertinent to an anticipation rejection in which all of the elements are found in a single prior art reference requiring no modification of the disclosed structure to reach the claimed invention. We find that the Examiner's determination that David's tensioning device, which supports a mine shaft cart filled with numerous

people, would be inherently capable of functioning as a fall arrest system for a single person, is supported by a preponderance of the evidence, and the Appellant has failed to meet the burden to show otherwise.

The Appellant notes that the European Patent Office considered David and decided that mine shaft rubbing ropes are not analogous to safety line inventions (Reply Br. 3). Under U.S. law, the question of whether a reference is analogous art is irrelevant to whether that reference anticipates, because the reference will still anticipate if it explicitly or inherently discloses every limitation recited in the claims. *In re Schreiber*, 128 F.3d 1473, 1478, 44 USPQ2d 1429, 1432 (Fed. Cir. 1997); *In re Self*, 671 F.2d 1344, 1350, 213 USPQ 1, 7 (CCPA 1982). In this case, as found by the Examiner, David's tensioning device discloses all of the elements of the claimed anchor assembly (Findings of Fact 2-6).

As such, we find that David anticipates claim 1. The Appellant did not separately argue the patentability of dependent claims 2-4 and 12. Accordingly, these claims fall with claim 1.

CONCLUSIONS OF LAW

We conclude the Appellant has not shown that the Examiner erred in rejecting claims 1-4 and 12 under 35 U.S.C. § 102(b) as anticipated by David.

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DECISION

The decision of the Examiner to reject claims 1-4 and 12 under 35 U.S.C. § 102(b) is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED

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